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Twenty-ninth session

SUMMARY RECORD OF THE 589th MEETING

Held at Headquarters, New York,
on Friday, 31 May 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 10.15 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A'50/17; A/CN.9/406, 407, 409 and Add.1-4, 421 and 426)

Article 12 (continued)

1. The CHAIRMAN said the only remaining problem with the informal working group's new text for article 12 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, which had been read out at the beginning of the previous meeting, was the conflict between paragraphs 3 and 7.

2. Mr. FERRARI (Italy) proposed that the words "and subject to paragraph 3" should be inserted in the first sentence of paragraph 7 after the phrase "Apart from establishing receipt of the data message", so as to reconcile the content of paragraph 7 with the reference to "legal effect" in paragraph 3.

3. Mr. TELL (France) said his delegation still wanted to delete the words "has requested or" from paragraph 1 and the words "requested or" from paragraph 2, as it had proposed at the previous meeting. He wondered whether paragraph 3 was necessary, since, if a data message was "conditional", it obviously had no legal effect until the relevant condition was met; the same could be said of paragraph 4. The proposed amendments seemed to call the whole structure and purpose of article 12 into question; in his view, the article was merely intended to set minimum standards for electronic data interchange. However, he did not object to the new version of the article, which provided for a more balanced relation between the parties and did not prejudge the legal consequences deriving from the receipt of a data message.

4. Ms. BOSS (United States of America) and Mr. KOIDE (Japan) said they supported the Italian proposal.

5. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said the Italian amendment should also refer to paragraph 4, because treating the data message as though it had never been transmitted was one of the legal consequences referred to in paragraph 7.

6. Ms. BOSS (United States of America) said paragraph 4 was not referred to in paragraph 7 because it concerned the establishment of the time of receipt, which was covered by the beginning of paragraph 7 as currently drafted. The key difference between paragraphs 3 and 4 was that the former went beyond the question of receipt to deal with the question of the effectiveness of the underlying message. Therefore, the amendment to paragraph 7 should refer only to paragraph 3.

7. Mr. FERRARI (Italy) said he supported the position of the United States.

8. Mr. ALLEN (United Kingdom), Mr. ANDERSEN (Observer for Denmark), Ms. REMSU (Observer for Canada) and Mr. SCHNEIDER (Germany) said they agreed

with the observer for the International Association of Ports and Harbors that the reference to paragraph 4 should be included.

9. The CHAIRMAN asked whether the Commission wished to delete the words in square brackets in the new version of paragraph 6.

10. Mr. PHUA (Singapore) said that if the term "applicable standards" in paragraph 6 did not require the clarification provided by the words in square brackets he had no objection to deleting those words.

11. Mr. MADRID (Spain) proposed that, since the words in square brackets were of an explanatory nature, they should be moved to the Guide to Enactment of the UNCITRAL Model Law (A/CN.9/426).

12. Mr. ABASCAL (Mexico) said that, in the final version of paragraph 3 in Spanish, the word "conditional" should be translated as "condicionado" and not "supeditado", as in the current translation.

13. Mr. FERRARI (Italy) suggested that the phrase he had proposed earlier for insertion in paragraph 7 should be changed to read, "and unless otherwise provided in this text", to cover both paragraph 3 and paragraph 4.

14. Mr. HOWLAND (United Kingdom) and Mr. ABASCAL (Mexico) said they supported the compromise solution proposed by the representative of Italy.

15. Mr. HERRMANN (Secretary of the Commission) said that if Italy's new proposal was adopted, paragraph 7 would state, essentially, that article 12 did not deal with the legal effects of a data message unless it dealt with them. To avoid such an awkward construction, it would be preferable to adopt the original amendment that referred specifically to paragraphs 3 and 4.

16. Ms. REMSU (Observer for Canada) and Mr. PHUA (Singapore) said they supported the inclusion of the phrase "and subject to paragraphs 3 and 4" in paragraph 7.

17. Mr. ZHANG Yuqing (China) said he shared the Secretary's views on the proposed amendment. However, he felt that the paragraph did not add anything of substance to article 12. If the other delegations agreed that paragraph 7 was superfluous, it should be deleted; otherwise, he supported the proposal to refer to both paragraph 3 and paragraph 4 in the amendment.

18. Mr. MADRID (Spain) said he supported the Chinese proposal to delete paragraph 7, since it only reflected the general principle that nothing in the Model Law was intended to impinge on applicable law. It might be more appropriate to include that paragraph in the Guide. If the other delegations wished to retain the paragraph in the Model Law, he supported the proposal to include a reference to paragraphs 3 and 4.

19. Ms. BOSS (United States of America) said that, although the viewpoint of China and Spain was understandable, paragraph 7 should be retained because it indicated that article 12 did not deal with offer and acceptance rules. However, the amendment referring to paragraphs 3 and 4 was unnecessary.

20. Mr. TELL (France) said he did not see the need for paragraph 7, but had no strong objections to retaining it. He agreed with the United States delegation that the proposed amendment was unnecessary, and felt that it could cause problems of interpretation.

21. Mr. FERRARI (Italy) said that, because paragraphs 3 and 4 (b) dealt with the issue of whether or not a data message had legal effects, they must be mentioned in paragraph 7.

22. Mr. CHOUKRI (Observer for Morocco) said he agreed with the Chinese and Spanish delegations that paragraph 7 was superfluous and should be either deleted or moved to the Guide.

23. Mr. SANDOVAL LÓPEZ (Chile) referred to the amendment to article 12; he had proposed the day before and expressed support for the draft of article 12 prepared by the informal working group. As paragraph 7 fulfilled no function, it should be eliminated from the Model Law; a reference to it could be included in the Guide to Enactment of the Model Law (A/CN.9/426).

24. Mr. ABASCAL (Mexico) said paragraph 7, while not essential, would be a useful tool in interpreting the text. It did indeed raise a legal issue, namely, whether or not the message had been received and, thus, whether or not the conditions had been fulfilled. That was different from the legal effects referred to in paragraphs 3 and 4 of the article. The problem seemed to be one of drafting.

25. Mr. SORIEUL (International Trade Law Branch) said the question could not be resolved by a drafting group. He recalled that the first draft of the Model Law had included a provision analogous to paragraph 7, which had later been transferred to the Guide. Ultimately, the Commission must decide whether it would be more appropriate to declare an absence of legal consequences in the Model Law or in the Guide.

26. Mr. TELL (France) said that, despite his earlier remarks, in the interest of compromise his delegation would consider retaining paragraph 7 and adding the phrase "and subject to paragraphs 3 and 4" after "data message".

27. Mr. HOWLAND (United Kingdom) said that in a spirit of compromise, his delegation too, would agree to retain paragraph 7. The Italian proposal and the proposal to include a reference to paragraphs 3 and 4 were equally problematic. Perhaps a viable compromise would be the United States suggestion to place the emphasis on the phrase "apart from establishing receipt of the data message".

28. In fact, the article did not deal with the establishment of receipt of data messages; it merely described two situations where data messages might be viewed as not having been transmitted. It might therefore be more accurate to say at the beginning of paragraph 7, "Apart from the question of whether or not the data message may be treated as having been transmitted, ...". That echoed the language of paragraph 4 (b). However, it was not consistent with paragraph 3, which stated that the data message had no legal effect until the acknowledgement was received. If the amendment proposed by the representative of Japan at the previous meeting was adopted and paragraph 3 was changed to read: "the data

message shall be treated as never having been transmitted ...," paragraph 7 would be consistent with both paragraph 3 and paragraph 4 (b). If, however, the current wording of paragraph 3 was used, the beginning of paragraph 7 would have to be amended to read: "Apart from the question of whether the data message may be treated as having legal effect in certain circumstances ...". It would be neater to change paragraph 4 (b) and deal with the question of whether the message had been transmitted in paragraph 7.

29. Mr. FERRARI (Italy) said that, subject to the amendment proposed at the previous meeting by the Japanese representative, his delegation supported the proposal just made by the United Kingdom representative, which took into account the suggestions made by the Secretary of the Commission.

30. Mr. CHANDLER (United States of America) said that the United Kingdom proposal to use the words "legal effect" in paragraph 7 seemed unduly complicated. The phrase "treated as though it had never been transmitted ...", however, was helpful, since it established a factual effect which avoided direct legal consequences, not unlike the principle of statutory time-limits in contract law. It only remained to deal with the question in the Guide to Enactment in order to ensure that there was no misunderstanding.

31. Mr. PHUA (Singapore) agreed with the United States representative. Without paragraph 7, there would be confusion about the legal consequences of article 12. As the domestic legislation in some countries prohibited statutory interpretation on the basis of a guide, paragraph 7 should be included in article 12 of the Model Law, as it had been in earlier drafts.

32. Mr. HERRMANN (Secretary of the Commission) pointed out that there would be more room to explain paragraph 7 in the Guide than in the Model Law. Another solution might be to refer to transmission rather than receipt in paragraph 7, as the United Kingdom representative had suggested. The other United Kingdom proposal, namely to use the term "legal effect" in the first part of paragraph 7, would simply reintroduce the problem.

33. Mr. BURMAN (United States of America) said that, as long as some delegations, such as that of Singapore, felt strongly about including paragraph 7, it should be retained. The changes in that paragraph proposed by the United Kingdom would improve article 12 as a whole because they would limit the extent to which legal consequences could flow from it. He requested clarification concerning the Japanese proposal made at the previous meeting to reconcile paragraph 3, which referred to legal effects, and paragraph 4 (b), which discussed treating the message as if it had never been transmitted.

34. Mr. SORIEUL (International Trade Law Branch) confirmed that the Japanese proposal had been adopted and that paragraph 3 would be made consistent with the wording of paragraph 4 (b).

35. Mr. ANDERSEN (Observer for Denmark) expressed support for the remarks made by the representative of Singapore. The Commission would probably be prepared to accept a compromise solution if it could be worked out by delegations which had strong feelings about paragraphs 3 and 4.

36. Mr. ZHANG Yuqing (China) expressed a preference for the secretariat's drafting of article 12. The term "legal consequences" was extremely vague and had no place in the article, which dealt exclusively with procedural matters. Paragraph 7 was superfluous, for other paragraphs of the article and indeed every article of the draft Model Law could conceivably have legal consequences. It was not for the Commission to analyse those consequences exhaustively, as States would tailor the Model Law to their own needs.

The meeting was suspended at 11.45 a.m. and resumed at 12.20 p.m.

37. Mr. ALLEN (United Kingdom), supported by Mr. ANDERSEN (Observer for Denmark) and Mr. BURMAN (United States of America) proposed that paragraph 7 should be amended to read: "Except in so far as it relates to the transmission or receipt of a data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt."

38. Mr. SORIEUL (International Trade Law Branch), responding to an inquiry from Mr. LEBEDEV (Russian Federation), read out the text of article 12, paragraph 3, as amended: "Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message is treated as though it had never been transmitted until the acknowledgement is received."

39. Mr. MADRID (Spain) recalled that paragraph 7 had been drafted in order to clarify the reference to "legal effect" in paragraph 3; since that reference had been eliminated in the latest formulation of paragraph 3, and since indirect reference to legal effect continued to exist in other paragraphs, it appeared that paragraph 7 had become superfluous.

40. Mr. CHOUKRI (Observer for Morocco) said that paragraph 7 was clearly superfluous and could be deleted, but if the Commission wished to preserve it, he proposed a clearer reformulation, as follows: "This article has no legal effect other than the legal consequences regarding the transmission or receipt of a data message."

41. Mr. LEBEDEV (Russian Federation) asked for an indication of the Commission's position on the need for paragraph 7.

42. Mr. GRIFFITH (Australia) said his delegation doubted the need for such an indication, as it was clear that Commission members either agreed that paragraph 7 was superfluous, or else felt that it improved the text.

43. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said he agreed with the previous speakers who had expressed the view that paragraph 7 was superfluous. Deletion of that paragraph would bring the formulation of article 12 one step closer to the secretariat's original draft of the article, which dealt more clearly and efficiently with the questions at issue.

44. The CHAIRMAN invited members of the Commission to take an indicative vote as to whether paragraph 7 should be retained.

45. Mr. ABASCAL (Mexico) said that an indicative vote simply indicated the views of the majority, and did not reflect a consensus. The preceding debate had revolved around the need perceived by several delegations for some clarification of the legal effects of article 12, in order to avoid possible misinterpretation of the Model Law. The trend in the Commission toward deleting paragraph 7 appeared to reflect drafting exigencies and not substantive ones, and he proposed instead that the United Kingdom's formulation of paragraph 7 should be accepted, subject to final drafting to be carried out by the drafting group.

46. An indicative vote was taken by a show of hands.

47. The CHAIRMAN said that according to the indicative vote, a substantial majority of the Commission appeared to favour retaining paragraph 7 as formulated by the United Kingdom.

48. Article 12, as amended, was adopted.

49. Mr. ZHANG Yuqing (China) said that the Commission had traditionally adopted articles by consensus, and the adoption of an article by a vote appeared to be unprecedented. The indicative vote had been intended only to provide an indication of the views of delegations on various issues, and not to take decisions on the adoption of articles. He inquired as to whether the vote just taken had been in conformity with the Commission's rules of procedure.

50. Mr. HERRMANN (Secretary of the Commission) said that the Chairman had clearly called for an indicative vote, which did not constitute a formal vote. Indicative voting had been used occasionally in the Commission as a means of saving time in debate once the arguments for and against a given proposal had already been made clear. Such voting remained indicative in the sense that no decision was directly taken thereby. In the vote just taken, the silence of those opposing the retention of the paragraph had been assumed to indicate their willingness to a accept the results, as was a necessary component of the consensus principle. In view of the result of that indicative vote, the matter had been assumed to have been concluded.

51. Mr. BURMAN (United States of America) expressed his delegation's support for the Secretary's comments. Indicative votes were a valid part of the Commission's procedures in that they allowed the Chairman to determine if a prevailing view existed on a matter of debate, thereby allowing the Commission's work to move forward.

52. Mr. ABASCAL (Mexico) said that notwithstanding the Secretary's explanation, the indicative vote procedure remained dangerous. If delegations had fundamental reasons for their positions in matters of debate, it was important to attempt to reach consensus on those matters, and not to impose decisions by a vote. A decision could be taken after the reasons for delegations' positions had been made clear, but a single delegation could have such fundamental objections to a position that consensus was impossible.

53. Mr. RAO (India) said he agreed with the representative of Mexico. He questioned whether the issue had been urgent enough to require a vote of any

kind. If not, it could have been left undecided until other outstanding agenda items had been dealt with. His delegation did not wish to encourage the practice of resorting to any form of voting in the case of model laws or draft notes. It was important to maintain a clear distinction between indicative voting and consensus in the Commission's procedures.

The meeting rose at 1 p.m.